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No. 06-1307

IN THE

Supreme Court of the United States

ROBERT A. JONES, Assistant Deputy Superintendent of Program Services, and DONALD SELSKY, Director, Special Housing/Inmate Disciplinary Programs,

Petitioners,

v.

JOSE PERALTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Heck v. Humphrey, 512 U.S. 477 (1994), and *Edwards v. Balisok*, 520 U.S. 641 (1997), hold that a prison inmate may not bring an action pursuant to 42 U.S.C. § 1983 to challenge the validity of a prison disciplinary proceeding that resulted in the deprivation of good time credits. It is undisputed that the respondent prisoner here has brought just such an action. The State petitioners seek this Court's review to determine whether the Second Circuit correctly held that a prisoner may avoid the bar of *Heck* and *Balisok* by abandoning any claim to relief relating to the loss of good time credits, and seeking relief only for the other sanctions – relating to conditions of confinement – that resulted from the disciplinary proceeding.

1. Respondent contends that this case is a "poor vehicle" (Br. in Opp. 18) for addressing the issue presented, and should await further proceedings on remand, but he is mistaken. He first suggests that on remand the case may become moot (Br. in Opp. 19), but that suggestion is utterly speculative, with no basis in the record or otherwise to support it, and begs the question whether the remand should have been ordered at all. He next suggests that if the case does not become moot, and the prisoner executes a waiver, the precise terms of that waiver will be relevant to this Court's decision (Br. in Opp. 19), but that claim misses the mark. Petitioners contend that the prisoner's claim is barred not because of the relief it seeks, but rather because it challenges a proceeding that affects the duration of his confinement and thus his claim "would, if established, necessarily imply the invalidity of the deprivation of his good-time credits," *Edwards v. Balisok*, 520 U.S. at 646, no matter what relief he seeks or declines to seek. That issue is squarely presented now, and would not in any way be informed by the precise form of any waiver the prisoner might execute on remand.

The mischief created by the Second Circuit's ruling, like the error in its reasoning, has its consequences now, and does not in any way depend on the form of any waiver that may be executed by the prisoner. Cases like this one will proliferate, increasing not only the burden on the federal courts but also the inappropriate intrusion of those courts on state administrative and judicial proceedings. The Second Circuit has recently remanded another case, *McEachin v. Selsky*, 2007 WL 1577969 (May 31, 2007) (summary order), for further proceedings in light of its decision here, and additional remands and district court proceedings can be expected to follow.[1]

Finally, respondent suggests (Br. in Opp. 19-22) that the case is inappropriate for review because the record leaves it unclear whether he could at this point refile a state court proceeding pursuant to New York Civil Practice Law and Rules Article 78, but that question is irrelevant to the question presented by this petition. Respondent appears to suggest (Br. in Opp. 21-22) that if no other federal or state relief is available to him, then any otherwise applicable bar created by *Heck* and *Balisok* should be lifted. That claim, however, presents a novel question of law that was not considered by the Second Circuit because respondent did not raise it in that court (Pet. App. 6a n.4). Consequently the issue should play no part in the Court's consideration of the petition for certiorari. The question now before the Court is whether *Heck* and *Balisok* close the door to respondent's § 1983 claim, not whether that door might be reopened if other remedies should prove to be unavailable.

2. Respondent contends that the decision below does not conflict with the decisions of other circuits (Br. in Opp. 7-11)

1. The number of disciplinary determinations involving mixed sanctions is substantial, but far less than it would be if respondent were correct in suggesting that prison officials may impose loss of good time purely for the purpose of avoiding federal review (Br. in Opp. 17-18). In a recent 12-month period, there were almost 17,000 disciplinary determinations in which mixed sanctions could have been imposed. Nevertheless, such sanctions were imposed in just over 7,000.

or with the decisions of this Court (Br. in Opp. 11-18), largely because no other court has considered the waiver procedure announced by the Second Circuit. But the decision below, holding that a prisoner can avoid the bar of *Heck* and *Balisok* by waiving any right to certain remedies, is itself in conflict with the rule that a § 1983 action is barred if the procedural defect asserted by the prisoner "would, if established, necessarily imply the invalidity of the deprivation of his good-time credits. . . ." *Balisok*, 520 U.S. at 646. That bar depends on the nature of the claim, and not the specific relief sought; thus a waiver of remedies cannot create a viable § 1983 claim where none would otherwise exist. Respondent's contrary view is based on a selective reading of this Court's precedents and is inconsistent with their reasoning.

As this Court explained in *Wilkinson v. Dotson*, 544 U.S. 74 (2005), the line of decisions from *Preiser v. Rodriguez*, 411 U.S. 475 (1973), to *Balisok* teaches that a prisoner has no § 1983 lawsuit "*if* success in that action would necessarily demonstrate the invalidity of the confinement or its duration." 544 U.S. at 82 (emphasis in original). Similarly, in *Muhammad v. Close*, 540 U.S. 749 (2004), the Court described *Heck* as holding that "where success in a prisoner's § 1983 action *would implicitly question* the validity of conviction or duration of sentence," the prisoner must show that the underlying conviction or determination has been invalidated. 540 U.S. at 749 (emphasis added).

In the instant case, any determination that respondent's procedural due process rights were violated at the disciplinary hearing would necessarily demonstrate the invalidity of the loss of good time, and thus the duration of his confinement, regardless of the remedies he seeks or promises to forego. This Court has made clear that where *Heck* and *Balisok* are implicated, the would-be plaintiff simply has no cognizable § 1983 claim at all until the underlying conviction or determination

has been invalidated. *Heck*, 512 U.S. at 483; *Balisok*, 520 U.S. at 643. No waiver can trump the force of this Court's decisions.

Respondent mistakenly argues that because the courts permit and enforce waivers in a wide variety of legal contexts, the particular waiver of relief invited by the Second Circuit can avoid the bar of *Heck* and *Balisok* (Br. in Opp. 14-15). But the waiver proposed by the Second Circuit in this case is utterly unlike the other waivers discussed by respondent. The Second Circuit rule would be analogous to permitting an incarcerated prisoner to use § 1983 to challenge the constitutionality of a conviction by waiving any claim to release from prison and seeking only relief relating to other consequences of conviction, such as the loss of the right to vote. If the prisoner were then to prevail, enforcing the waiver would entail the implausible result of holding a person in prison after a judicial determination that his confinement was unconstitutional. Enforcing such a waiver is utterly unlike enforcing a waiver of the underlying claim, which prevents the court from making any determination of whether the confinement was in fact unconstitutional.

Likewise, respondent is mistaken in analogizing the proposed waiver procedure to the law with respect to habeas corpus petitions that contain both exhausted and unexhausted claims (Br. in Opp. 14-15; *see also* Pet. App. 14a n.7). If a prisoner files a habeas corpus petition containing both exhausted and unexhausted claims, he may avoid the exhaustion bar of 28 U.S.C. § 2254(b) by deleting the unexhausted claims. *Rhines v. Weber*, 544 U.S. 269, 278 (2005); *Rose v. Lundy*, 455 U.S. 509, 520 (1982). But this procedure is unlike the waiver procedure announced in the instant case in two respects.

First, a prisoner who deletes unexhausted claims is ordinarily deleting separate constitutional challenges to the conviction, not separate forms of relief. Here, however, the waiver would permit the prisoner to forego not an independent ground for relief, but instead the logical consequences that would

ineluctably flow from a decision on the merits in his favor. Second, a prisoner who deletes unexhausted claims does not, contrary to respondent's assertion, "forever waiv[e] relief as to his unexhausted claims." (Br. in Opp. 14). On the contrary, he remains free to pursue his claims in state court unless procedurally barred, and after exhausting state remedies he may even return to federal court, unless he is barred by procedural rules such as the restrictions on successive petitions (28 U.S.C. § 2244(b)) or the one year statute of limitations (28 U.S.C. § 2244(d)).

The rule allowing a prisoner to delete unexhausted claims from his habeas petition can never result in a federal court determining that his incarceration is unconstitutional but that he must nevertheless remain incarcerated. Because the waiver rule announced by the Second Circuit has precisely this consequence, it can find no support in that rule.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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